

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

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COURT OF APPEALS
DIVISION TWO

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| CASEY D., |) | |
| |) | |
| Appellant/Cross-Appellee, |) | 2 CA-JV 2007-0047 |
| |) | DEPARTMENT B |
| v. |) | |
| |) | <u>MEMORANDUM DECISION</u> |
| JENNIFER P. and CASEY D., |) | Not for Publication |
| |) | Rule 28, Rules of Civil |
| Appellees/Cross-Appellants. |) | Appellate Procedure |
| |) | |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. S-170897

Honorable Javier Chon-Lopez, Judge

AFFIRMED

| | |
|----------------|---------------------------------------|
| David J. Polan | Tucson |
| | Attorney for Appellant/Cross-Appellee |

| | |
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| Randall M. Sammons | Tucson |
| | Attorney for Appellees/Cross-Appellants |

E C K E R S T R O M, Presiding Judge.

¶1 Casey D. appeals from the juvenile court's order terminating his parental rights to his son, Casey James D. (C.J.), who was born in December 1995. In September 2004, C.J.'s mother, Jennifer P., petitioned for the termination on grounds of abandonment, A.R.S. § 8-533(B)(1), and neglect, § 8-533(B)(2), and also citing § 8-533(B)(3), Casey's "long history of violent and felonious behavior[,] . . . and . . . reasonable grounds to believe that

those conditions will continue for a prolonged, indetermin[ate] period of time.” The juvenile court found terminating Casey’s parental rights was warranted on the ground of abandonment and was in C.J.’s best interests. Casey contends there was insufficient evidence to support these findings.

¶2 In reviewing a juvenile court’s factual findings, we defer to that court’s superior opportunity “to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts.” *Ariz. Dep’t of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d 943, 945 (App. 2004). Thus, “[w]e view the evidence, and draw all reasonable inferences from it, ‘in favor of supporting the findings’” upon which the order is based. *Jesus M. v. Ariz. Dep’t of Econ. Sec.*, 203 Ariz. 278, ¶ 13, 53 P.3d 203, 207 (App. 2002), *quoting In re Maricopa County Juvenile Action No. J-75482*, 111 Ariz. 588, 591, 536 P.2d 197, 200 (1975). We do not reweigh the evidence, *Lashonda M. v. Arizona Department of Economic Security*, 210 Ariz. 77, ¶ 13, 107 P.3d 923, 927 (App. 2005), and will affirm a termination order “unless no reasonable evidence supports” the court’s findings and the order is clearly erroneous. *Jennifer B. v. Ariz. Dep’t of Econ. Sec.*, 189 Ariz. 553, 555, 944 P.2d 68, 70 (App. 1997).

Abandonment

¶3 In a detailed ruling supported by testimony at the termination hearing, the juvenile court has described Casey’s absence from C.J.’s life since April 30, 2004. We need not repeat those details here and refer to the facts only as necessary to address Casey’s argument.

¶4 Section 8-531, A.R.S., defines abandonment as:

the failure of a parent to provide reasonable support and to maintain regular contact with the child, including providing normal supervision. Abandonment includes a judicial finding that a parent has made only minimal efforts to support and communicate with the child. Failure to maintain a normal parental relationship with the child without just cause for a period of six months constitutes prima facie evidence of abandonment.

Casey contends the court's finding of abandonment is clearly erroneous because Casey "did make efforts to secure a relationship with his son," but his "every attempt . . . was thwarted, either by circumstances or by Court order."

¶5 Casey refers to proceedings in a special paternity action Jennifer had filed within a year of Casey's birth.¹ In June 2002, while in prison, Casey filed an order to show cause to establish visitation and child support. The domestic relations court granted Casey supervised visitation with C.J. sometime after Casey's release from prison in August 2003. But in December 2003, after Casey assaulted his parents during one of C.J.'s visits, the court ordered that Casey have no contact with C.J. except as directed by C.J.'s therapist, Dr. Richard Hinton. The domestic relations court never considered the issue of child support, and the only support payment Jennifer has received since Casey's release from prison was \$100 in September 2003.

¹Although the juvenile court designated the record in the special paternity action, cause number SP8750, as "part of the record of this case," it has not been included for review. No party has disputed the juvenile court's characterization of the contents of that record, however. We therefore assume the accuracy of the termination order in this regard.

¶6 In a March 2004 letter to the domestic relations court, Hinton recommended that renewed contact between Casey and C.J. be authorized only after Casey had “undergone a thorough evaluation to determine his emotional status, capacity for impulse control, and parenting ability” and after the domestic violence incident had been resolved by the courts. He further recommended that “a hearing be held for the purpose of reviewing the status of the case” but that, pending such a hearing, “there be no contact between C.J. and his . . . father.” Casey moved to Phoenix in February or March 2004 and then to California a few months later. He testified he had provided his lawyer with his contact information for both locations and had continued to communicate sporadically with his attorney after April 2004. On those occasions, Casey said, his lawyer had told that his efforts to resume visitation would move slowly.

¶7 Although the domestic violence incident between Casey and his parents was resolved by Casey’s conviction for assault in the fall of 2004, Casey never underwent the evaluation Hinton had recommended as a prerequisite to renewing his visitation rights with C.J. Casey nonetheless argues he had “just cause” for failing to have contact with C.J. because “a hearing . . . regarding [Casey’s] status in the [domestic relations] case . . . was never held.” Similarly, Casey maintains he did not provide financial support for C.J. because the domestic relations court had not acted on his motion to establish child support.

¶8 In its decision, the juvenile court found Casey’s credibility to be “poor” and noted Casey had presented no evidence he had undergone a psychological evaluation and “no objective evidence that he [had] demanded a court hearing to assert his rights.” The

juvenile court also considered the affidavit of Casey's former domestic relations attorney who had moved to withdraw from representing Casey in March 2005 because, the lawyer averred, Casey had failed to maintain contact, provide a current address, or answer his telephone.²

¶9 We will not reweigh the evidence, *Lashonda M.*, 210 Ariz. 77, ¶ 13, 107 P.3d at 927, and find no error in the court's finding of abandonment. The juvenile court correctly noted that it was required to consider Casey's conduct, rather than his subjective intent, in determining whether he had "provided reasonable support, maintained regular contact, made more than minimal efforts to support and communicate with [C.J.], and maintained a normal parental relationship." See *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 22, 995 P.2d 682, 686 (2000). And, the juvenile court reasoned, *quoting Michael J.*, 196 Ariz. 246, ¶ 25, 995 P.2d at 687, "'The burden to act as a parent rests with the parent, who should assert his legal rights at the first and every opportunity.'" Reasonable evidence in the record supports the juvenile court's finding that Casey "did not adequately pursue his legal or emotional ties to his son C.J. from April 30, 2004 until . . . October 2005."

Best Interests

¶10 Casey argues the evidence was insufficient to support the juvenile court's finding that terminating his parental rights was in C.J.'s best interests. Specifically, he

²On appeal, Casey notes his former attorney did not testify at the hearing but develops no legal argument that the court improperly relied on the lawyer's affidavit. Any objection to the court's reliance on this affidavit has therefore been waived. *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) ("Failure to argue a claim usually constitutes abandonment and waiver of that claim.").

challenges the basis for the “best interests” opinion in the social summary prepared by Sandy Chirumblo pursuant to A.R.S. § 8-536(A) because Chirumblo testified she did not have complete information about Casey’s visitation rights and had not spoken with C.J. privately.

¶11 To establish that the termination of Casey’s parental rights was in C.J.’s best interests, Jennifer was required to prove by a preponderance of the evidence, *see Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005), that C.J. would affirmatively benefit from the severance. *Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 6, 804 P.2d 730, 735 (1990). “The existence of a current adoptive plan is one well-recognized example of such a benefit.” *Oscar O.*, 209 Ariz. 332, ¶ 6, 100 P.3d at 945. Here, the juvenile court relied on evidence that Jennifer’s husband, Mr. P., “wishes to adopt C.J. and has adopted [Jennifer’s] other child” and found that “C.J. will benefit from living in a stable home with [Jennifer] and Mr. P[.]” Reasonable evidence, supplied by the testimony of Jennifer and Mr. P., supports this finding, and we will not disturb it. *See Jennifer B.*, 189 Ariz. at 555, 944 P.2d at 70.

Conclusion

¶12 Accordingly, we adopt the juvenile court’s comprehensive findings of fact, approve its conclusions of law, and affirm its order terminating Casey’s parental rights. *See Jesus M.*, 203 Ariz. 278, ¶ 16, 53 P.3d at 207-08.

¶13 We note that Jennifer has requested an award of her attorney fees on appeal pursuant to Rule 21, Ariz. R. Civ. App. P., and A.R.S. §§ 12-341.01 and 12-349. She contends that, because the juvenile court’s factual findings are reviewed for an abuse of

discretion, Casey had “no good grounds . . . for an [a]ppeal.” We note first that Rule 21 is not among the Arizona Rules of Civil Appellate Procedure that Rule 88(G), Ariz. R. P. Juv. Ct., makes applicable to appeals in juvenile cases. Additionally, Jennifer has offered no evidence or argument suggesting that Casey’s appeal constituted harassment and was made in bad faith, §§ 12-341.01(C), 12-349(F); was brought “solely or primarily for delay or harassment,” § 12-349(A)(2); or “[u]nreasonably expand[ed] or delay[ed] the proceeding,” § 12-349(A)(3). Jennifer’s request for attorney fees is therefore denied.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

PHILIP G. ESPINOSA, Judge

GARYE L. VÁSQUEZ, Judge